BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANNY KNOBEL, Claimant, v. PACIFIC CABINETS – McCARTHY/ST. ALPHONSUS, Employer, and ARCH CONSTRUCTION INSURANCE, Surety, Defendants.	)	**IC 2006-006673** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 21, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on November 20, 2007. Claimant, Danny Knobel, was present in person and represented by Darin G. Monroe of Boise. Defendant Employer, Pacific Cabinets-McCarthy/St. Alphonsus (Pacific), and Defendant Surety, Arch Construction Insurance were represented by Scott Wigle, of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on March 7, 2008.

ISSUES

The issues to be resolved were narrowed at hearing and are:

1. The date Claimant became medically stable;

2. Claimant's entitlement to additional total temporary disability benefits;

3. Claimant's entitlement to disability in excess of impairment; and

4. Claimant's entitlement to attorney fees.

ARGUMENTS OF THE PARTIES

As a result of his industrial accident of May 30, 2006, Claimant asserts he did not achieve medical stability until June 8, 2007, and is entitled to total temporary disability benefits from February 27, 2007, until June 8, 2007. He alleges permanent partial disability of 47% inclusive of his 5% permanent impairment. Claimant also requests attorney fees for Defendants' denial of his claim.

Defendants admit Claimant's industrial accident but contend that Claimant became medically stable on February 27, 2007, and is not entitled to any further temporary disability benefits. They acknowledge Claimant's 5% permanent impairment but deny any disability in excess of impairment. Finally Defendants assert they have contested Claimant's claim reasonably and no attorney fees are warranted.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Harry Tucker, and Bob Reidelberger taken at the November 20, 2007, hearing;

2. Claimant's Exhibits 1 through 8 and 11 admitted at the hearing;

3. Defendants Employer and Surety's Exhibits 1 through 13 admitted at the hearing;

4. Post-hearing deposition of Tyler Frizzell, M.D., taken by Claimant on December 6, 2007;

5. Post-hearing deposition of Douglas N. Crum, CDMS, taken by Claimant on December 10, 2007;

6. Post-hearing deposition of William C. Jordan, MA, CRC, CDMS, taken by Defendants on December 14, 2007; and

7. Post-hearing deposition of Kevin R. Krafft, M.D., taken by Defendants on December 17, 2007.

All objections posed during the post-hearing depositions of Dr. Frizzell and Bill Jordan are sustained. The objection posed during the post-hearing deposition of Douglas Crum is overruled. After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1972. He was 35 years old and resided in Boise at the time of the hearing. Claimant completed the eighth grade and then left school to work on the family farm. Thereafter he washed dishes at restaurants in addition to farming. Claimant began roofing at age 16. He drove trucks, delivered roofing supplies and tore off old roofing materials. He worked in roofing for about five years and eventually earned $15 per hour. Thereafter Claimant operated his own business with a friend for two years installing cedar siding, custom decks, and log faces to residential properties. Claimant later worked in construction for Potlatch.

2. In approximately 1998, Claimant joined the United Brotherhood of Carpenters and

Joiners of America Local 635 (Union).

3. In 1999, Claimant commenced working for $10 per hour for Nits Cabinets where he learned cabinet building, installation, and millwork. He regularly lifted over 75 pounds in his work. He became a journeyman cabinet maker and was earning approximately $16 per hour when he left.

4. Claimant then worked for Cabinet Concepts where he constructed cabinets and performed heavy physical work. He earned $14 per hour plus regular bonuses. Claimant had no significant physical injuries prior to working for Cabinet Concepts. While working at Cabinet Concepts, Claimant injured his back and treated with Todd Kramer, D.C., for approximately six weeks after which he had no further back pain, discontinued chiropractic treatments, and fully resumed his normal activities.

5. In approximately 2003, Claimant operated his own cabinet business installing custom millwork and cabinets. His specialty millwork included window trim, doors, molding, and similar finish carpentry. Custom windows weighed from 130 to 150 pounds each. Exterior wooden doors weighed over 80 pounds each, and exterior steel doors weighed approximately 100 pounds each. Claimant regularly lifted up to 150 pounds.

6. In approximately March 2006, Claimant was placed on a job with Pacific Cabinets through the Union and subsequently began installing cabinets at St. Alphonsus Regional Medical Center. Claimant helped install islands, countertops, medicine trays, and cabinets weighing from 15 to approximately 300 pounds. He regularly lifted over 100 pounds by himself.

7. On May 30, 2006, Claimant was unloading cabinets and countertops when he lifted a 200 pound cabinet and felt an immediate lightning-type pain from his neck to his toes. At the time of his injury, he was earning $18.05 per hour without benefits, and $27.33 per hour considering

Union benefits. Claimant notified his supervisor of his injury.

8. Claimant was treated by Jacob Kammer, M.D., and Kevin R. Krafft, M.D., for radiating low back pain, mid back, neck and shoulder pain. Clamant was also seen by Tyler Frizzell, M.D., who diagnosed non-surgical thoracic disk protrusions at T3-4 and T4-5 caused by Claimant's May 30, 2006, industrial accident. Dr. Frizzell defined disk protrusion as a relatively small amount of the nucleus pulposus of the disk escaping from and being partially out of the annulus fibrosis of the disk but still contained. Frizzell Deposition, pp. 9, 10, 13, 14. Claimant received conservative medical treatment for approximately one year. By February 2007 he completed the STARS rehabilitation program which he considered excellent and which improved his functionality to some extent.

9. On February 27, 2007, Dr. Krafft rated Claimant's permanent impairment at 5% of the whole person. Dr. Krafft restricted Claimant to lifting no more than 75 pounds occasionally and 45 pounds frequently, however Dr. Krafft later wrote an addendum indicating that these restrictions were temporary. Defendants terminated temporary disability benefits on February 27, 2007. Dr. Krafft continued to see Claimant periodically until June 8, 2007, when Dr. Krafft gave Claimant permanent restrictions of lifting no more than 75 pounds occasionally and 45 pounds frequently.

10. Industrial Commission rehabilitation consultant Bob Reidelberger tried to find work for Claimant at several area cabinet shops, but was not successful. He opined Claimant would need a cabinet shop specializing in lighter materials.

11. Claimant has resumed operating his own cabinet business, but business is slow. He builds cabinets and installs siding on cabins. Claimant testified that after three or four hours of work his back and neck become stiff and sore.

12. Claimant has applied for work at H&H Cabinets and Treasure Valley Woodworking, but due to his physical restrictions has not been offered employment.

13. Having observed Claimant at hearing, and carefully examined the record herein, the Referee finds Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

14. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

15. **Medical stability and additional temporary disability benefits.** The first issues include the date Claimant became medically stable and whether he is entitled to additional temporary disability benefits. Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Furthermore:

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and

> legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

16. In the present case, Dr. Krafft's notes regarding Claimant's medical stability are somewhat confusing at first blush. On February 27, 2007, Dr. Krafft recorded his impression that Claimant was "MMI" but did not expressly note that Claimant was medically stable. However he rated Claimant's permanent impairment at 5% of the whole person based upon a DRE thoracic category 2 given Claimant's documented T3-4 and T4-5 disk protrusions. Claimant's Exhibit 1, p. 000058. Dr. Krafft restricted Claimant to lifting no more than 75 pounds occasionally and 45 pounds frequently. On March 8, 2007, Dr. Krafft wrote an addendum confirming Claimant's lifting restrictions of 75 pounds occasionally and 45 pounds frequently and declaring: "These restrictions are temporary and are anticipated to be discontinued by June of 2007." Claimant's Exhibit 1, p. 000059. Dr. Krafft did not expressly comment further on Claimant's medical stability. Defendants terminated temporary disability benefits on February 27, 2007, and never restarted them thereafter.

17. Dr. Krafft next saw Claimant on March 21, 2007, and increased his medication. Dr. Krafft's record did not expressly mention medical stability, but reaffirmed that Claimant's work restrictions "remained unchanged from his impairment, allowing him to lift 75 pounds on an occasional basis and 45 pounds frequently." Claimant's Exhibit 1, p. 000062.

18. Dr. Krafft next saw Claimant on April 5, 2007, and adjusted his medications. Dr. Krafft noted that Claimant had some right shoulder symptoms. Dr. Krafft's note did not expressly

mention medical stability but noted that Claimant's return to work restrictions were unchanged.

19. Dr. Krafft next saw Claimant on May 4, 2007, and adjusted two of Claimant's medications. Dr. Krafft noted: "History of thoracic strain: We are reaching the timeframe that Dr. Frizzell outlined that he should be healed. Anticipate no further formal treatment will be needed after our next visit." Claimant's Exhibit 1, p. 000067. He did not expressly mention medical stability but continued to recommend a 75 pound lifting restriction. Dr. Krafft concluded his note: "He'll return to clinic in four weeks for follow-up, at which time I anticipate completion of his treatment regimen." Claimant's Exhibit 1, p. 000068.

20. Dr. Krafft next saw Claimant on June 8, 2007, at which time Dr. Krafft recorded his impression: "1. Thoracic strain, MMI and stable. …. 4. No further treatment is recommended at this time. He is at MMI. His impairment has been rated and he is ready to return to the work force." Claimant's Exhibit 1, p. 000070.

21. The above review of Dr. Krafft's notes establishes that while he rated Claimant's impairment on February 27, 2007, based upon documented thoracic disk protrusions, Dr. Krafft anticipated further improvement in Claimant's physical capacity which would be reflected in the discontinuation of his physical restrictions by June 2007. Apparently the improvement anticipated did not occur. It was not until June 8, 2007, that Dr. Krafft's notes indicate that he believed Claimant had completed all treatment necessitated by his industrial accident, and Dr. Krafft clearly recorded that Claimant was medically stable. He then reiterated Claimant's permanent impairment and physical restrictions.

22. The Referee finds that Claimant was still in a period of recovery from February 27, 2007, until June 8, 2007, when he achieved medical stability. The record contains no indication that

Employer offered Claimant work within his restrictions between February 27, 2007, and June 8, 2007, or that suitable work which he had a reasonable opportunity to procure was available to him during this period. Claimant is entitled to total temporary disability benefits from February 27, 2007, until June 8, 2007.

23. **Permanent Disability**. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

24. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of

permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

25. Permanent disability is determined in part by permanent physical restrictions. Dr. Krafft restricted Claimant to lifting no more than 45 pounds frequently and 75 pounds occasionally. Dr. Frizzell restricted Claimant to lifting no more than 44 pounds frequently and 76 pounds occasionally. Dr. Frizzell also reviewed Claimant's functional capacity evaluation performed at the conclusion of his STARS rehabilitation program and concluded that Claimant is also restricted on a daily basis to sitting three to fours hours with frequent positional changes and breaks, standing five to six hours with frequent breaks, walking five to six hours with regular breaks, and using his upper extremities three to four hours with frequent positional changes and breaks. Claimant is further restricted to occasional crawling. Dr. Frizzell opined Claimant could not return to his time of injury job.

26. Claimant's vocational expert, Douglas Crum, CDMS, initially reported that Claimant had lost access to about 24% of the jobs in his overall labor market, and 40% of construction sector jobs. Crum initially believed that Claimant could perform some finish carpentry and cabinet making jobs even given his physical restrictions. However, after further review and consideration of Claimant's functional capacity evaluation, Crum opined that Claimant's physical restrictions precluded him from all finish carpentry and cabinet making work. Crum opined that Claimant had lost access to nearly 70% of his general labor market and 100% of the jobs in the construction sector. Crum concluded that Claimant would most likely obtain employment at approximately $9.50 per hour and thus suffer a loss of wage earning capacity of approximately 47% inclusive of his 5% impairment.

27. Crum assumed that Claimant's time of injury wage, $18.05 per hour, was representative of his prior earnings based upon the assumption that Claimant was principally a Union worker prior to his accident. Crum expressly assumed that Claimant had worked several other Union jobs in arriving at his opinion of Claimant's loss of wage earning capacity. Crum opined that in addition to his wage, Claimant was also earning Union benefits in the amount of $8.28 per hour at the time of his accident.

28. Crum acknowledged that according to the lifting restrictions imposed by Drs. Krafft and Frizzell, Claimant can perform medium duty work which is generally defined as lifting up to 50 pounds occasionally and 25 pounds frequently. Crum also acknowledged that finish carpentry and cabinet making are generally considered medium duty occupations according to the Dictionary of Occupational Titles. Nevertheless, Crum opined that the actual cabinet making and millwork positions he researched in the Boise area all required lifting more than 75 pounds.

29. Defendants' vocational expert, William Jordon, M.A., CRC, CDMS, testified that Claimant's five year wage history averaged $7.17 per hour assuming a 40 hour work week year round. Jordan testified that Claimant's highest year recorded income, $24,365 in 2003, reflected a wage history of $11.71 per hour assuming a 40 hour work week for that year. Jordan also contacted the Union and was assured that the Union would work with a member having physical restrictions. Jordan opined that given Claimant's physical restrictions as imposed by Dr. Krafft, and the cabinet making and installation job site evaluation he prepared with input from Employer, Claimant is able to return to his time of injury occupation. Jordan thus concluded Claimant would sustain no disability beyond impairment. Jordan also opined that accepting Dr. Frizzell's opinion that Claimant's physical restrictions would preclude him from returning to his time of injury work,

Claimant would still be able to compete for lighter cabinet installation positions and would then likely experience permanent disability of 12%, inclusive of his 5% impairment.

30. The record suggests that a critical factor in the weight handled during cabinet installation is the availability of assistants and jack stands. Jordan's contacts indicated that assistants and jack stands are routinely available to help in supporting the weight of cabinets during installation. Claimant and Crum indicated that such are not always available.

31. Industrial Commission rehabilitation consultant Bob Reidelberger testified that cabinet installation and cabinet making are classified as heavy and occasionally very heavy work with lifting over 100 pounds. Reidelberger noted that although the Dictionary of Occupational Titles indicates cabinet building and cabinet installation is medium duty work, Reidelberger's contacts with area cabinet shops convinced him that lifting over 75 pounds was generally required. Reidelberger also opined that Claimant could perform lighter production work at Truss Craft and similar businesses, where lifting was limited to 35 pounds.

32. Claimant's time of injury wages reflect his actual skill and high wage earning capacity as a Union journeyman. However, Claimant had been working for Pacific Cabinets for only approximately two months before he was injured. As clearly documented by his earnings history, the $18.05 per hour ($27.33 per hour considering Union benefits), which Claimant was earning at the time of his injury reflects a wage Claimant did not earn consistently. Claimant's high hourly earnings at the time of his injury must be considered against the regular availability of such high paying jobs. Claimant's earnings history over the five years prior to his accident strongly suggest that such high paying jobs were not consistently available to Claimant.

33. Claimant was earning over $18 per hour plus benefits at the time of his industrial

accident. He has sustained permanent impairment of 5% of the whole person, with permanent work restrictions of lifting no more than 75 pounds occasionally and 45 pounds frequently. Claimant also has significant further restrictions regarding sitting, standing, crawling, and use of his upper extremities. Considering his non-medical factors, including his age, eighth grade education, failure to complete high school, modest computer skills, limited transferable skills in sedentary and light occupations, inability to return to a number of his previous occupations, and likely inability to compete for many cabinet making and installation positions, Claimant's ability to engage in gainful activity has been significantly reduced. Claimant has established a permanent disability of 25% of the whole person, inclusive of his permanent impairment.

34. **Attorney fees.** Claimant seeks attorney fees for Defendants' denial of his claim for additional temporary and permanent disability benefits. Idaho Code § 72-804 provides in part:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law.

35. Attorney fees are not granted to a claimant as matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804. The decision that grounds exist for awarding a claimant attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

36. Claimant first alleges entitlement to attorney fees for Defendants' denial of temporary

disability benefits. Dr. Krafft's note of February 27, 2007, with its impairment rating and addendum dated March 8, 2007, is sufficiently confusing when considered in light of his note of June 8, 2007, to explain Defendants' termination of total temporary disability benefits on February 27, 2007. Defendants' denial of additional temporary disability benefits, though unpersuasive, was not unreasonable.

37. Claimant also alleges entitlement to attorney fees for Defendants' denial of permanent disability benefits. Defendants' vocational expert, Bill Jordan, opined that given Claimant's physical restrictions as imposed by Dr. Krafft, and the job site evaluation prepared according to Employer's input, Claimant is able to return to his time of injury occupation and thus arguably would sustain no disability beyond impairment. Furthermore, Jordan testified that even assuming loss of some labor market access, Claimant would not experience an actual loss of earnings under the restrictions imposed by Dr. Frizzell. Although this aspect of Jordan's opinion is not persuasive, it is based upon an informed analysis. Defendants' reliance upon Jordan's opinion in support of their denial of permanent partial disability benefits was not unreasonable.

CONCLUSIONS OF LAW

1. Claimant has proven he became medically stable on June 8, 2007, and is entitled to additional temporary disability benefits from February 27, 2007, until June 8, 2007.

2. Claimant has proven he suffers permanent disability of 25%, inclusive of his permanent impairment as a result of his May 30, 2006, industrial accident.

3. Claimant has not proven his entitlement to an award of attorney fees.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this _20th_day of June, 2008.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANNY KNOBEL, Claimant, v. PACIFIC CABINETS – McCARTHY/ST. ALPHONSUS, Employer, and ARCH CONSTRUCTION INSURANCE, Surety, Defendants.	)	**IC 2006-006673** **ORDER** Filed July 21, 2008

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven he became medically stable on June 8, 2007, and is entitled to additional temporary disability benefits from February 27, 2007, until June 8, 2007.

2. Claimant has proven he suffers permanent disability of 25%, inclusive of his permanent impairment as a result of his May 30, 2006, industrial accident.

3. Claimant has not proven his entitlement to an award of attorney fees.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this _21st_ day of __July_____, 2008.

INDUSTRIAL COMMISSION

_/s/_____
James F. Kile, Chairman

Commissioner Maynard participated, but did not sign.

_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _21st_ day of __July_____, 2008 a true and correct copy of **Findings, Conclusions, and Order** was served by regular United States Mail upon each of the following:

DARIN G MONROE
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W SCOTT WIGLE
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ka _/s/_____